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BY ECF

The Honorable Alison J. Nathan
United States District Court
Southern District of New York
40 Foley Square, Room 2102
New York, NY 10007

Re: *United States ex rel. Lacey v. Visiting Nurse Service of New York* (No. 14-cv-5739): Notice of Supplemental Authority

Dear Judge Nathan:

We write on behalf of Relator Edward Lacey to provide the Court with notice of *United States ex rel. Wood v. Allergan, Inc.,* No. 10-cv-5645 (JMF), 2017 U.S. Dist. LEXIS 50103 (S.D.N.Y. Mar. 31, 2017). There, the Court largely denied the defendant's motion under Rules 9(b) and 12(b) to dismiss the False Claims Act complaint. In doing so, the Court ruled on several questions at issue in VNSNY's pending Motion to Dismiss.[1]

First, the Court held that under an implied certification theory of False Claims Act liability a Relator is *not* required to show a "specific representation" that makes a claim false. Mere submission of a claim for payment "coupled with noncompliance with a material payment requirement" is enough. 2017 U.S. Dist. LEXIS 50103, at *72 (citing *United States ex rel. Mikes v. Straus*, 274 F.3d 687, 700 (2d Cir. 20011), *abrogated on other grounds by Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016)).

Second, the Court followed the "holistic" approach to assessing materiality, which includes (but does not require) as factors supporting materiality: the violation of a condition of payment; government "alerts and guidance . . . warning against" the misconduct; legislative history admonishing the misconduct; and allegations of significant government losses. 2017 U.S. Dist. LEXIS 50103, at *87 (citing *Escobar*, 842 F.3d 103, 109 (1st Cir. 2016)), and at *88, n.29.

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[1] Defendant filed its Motion to Dismiss on November 21, 2016. Relator filed his Opposition on December 23, 2016. Defendant filed its Reply on January 20, 2017.

Third, the Court held that identifying specific false claims is not a pre-requisite for satisfying Rule 9(b). "Instead, it suffices for a relator to provide identifying information about a representative sample of false claims . . . ." 2017 U.S. Dist. LEXIS 50103, at *96. This means supplying enough detail to allow the defendant to "connect the dots" so it can "reasonably identify the particular false claims" at issue. *Id.* at *97, 101 (pointing to services provided, relevant time period, healthcare provider, why claim was false). The Court stressed that the purpose of Rule 9(b) "is to ensure that defendants have sufficient notice -- not to immunize them from suit at the outset . . . and to conclude otherwise might allow the more sophisticated entity to escape liability merely because of the complexity of their scheme." *Id.* at *105-07 (internal quotes and cite omitted).[2]

Respectfully submitted,

Gordon Schnell

cc: All Counsel of Record (via ECF)

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[2] For the parties' relevant briefing on these issues, *see* VNSNY's MTD at 8-9, Reply at 5-6 and Relator's Opp. at 14, 14 n.15 (for issue 1); VNSNY's MTD at 9-11, Reply at 5 n.5 and Relator's Opp. at 15-16 (for issue 2); and VNSNY's MTD at 19-24, Reply at 8-10 and Relator's Opp. at 20-24 (for issue 3).